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IN THE

Supreme Court of the United States

October Term, 1973

No. ...73-352

WAYNE HUBERT BRASS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

HARRY H. PETERSON
JOHN REMINGTON GRAHAM
RICHARD T. OAKES
The Midwestern School of Law
111 East Franklin Avenue
Minneapolis, Minnesota 55404
HARROP A. FREEMAN
The Cornell Law School
Myron Taylor Hall
Ithaca, New York 14850
Curry First
PERRY & FIRST
222 East Mason Street
Milwaukee, Wisconsin 53202
Attorneys for the Petitioner

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JURISDICTION

Jurisdiction to hear and decide questions on writ of certiorari is given in Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

1st. Did the Framers of the Constitution specifically intend the federal power to raise and support Armies as nothing more than authority to hire professional soldiers, in war or peace, as the need should arise?

2nd. Did the Framers of the Constitution specifically intend all federal powers of compulsory military service to be authorized by, but confined to the processes for, and

limitations on organizing, arming, disciplining, and calling forth the Militia?

3rd. Can the Supreme Court change the intended meaning of the Constitution by interpreting clauses conferring power beyond the limits of original grant?

CONSTITUTIONAL PROVISIONS

The following provisions of the Constitution of the United States are here pertinent:

—Article I, Section 8, Clauses 12, 15, 16, and 18, which read, "The Congress shall have Power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions; To provide for organizing, arming, and disciplining the Militia, and for governing such part of them as may be employed in the Service of the United States, reserving to the States respectively the Appointment of the Officers, and the Authority of training the Militia according to the Discipline prescribed by Congress . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . ."

—Amendment II, which reads, "A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."

—And Amendment X, which reads, "The powers not delegated to the United States by the Constitution, or prohibited by it to the States, are reserved to the States respectively, or the People."

STATUTORY PROVISIONS

The statute brought into question is the Military Selective Service Act, Title 50 Appendix, United States Code, Sections 451-462, the contents of which, so far as here relevant, were stipulated by the Respondent and the Petitioner in and with the approval of the United States District Court for the Eastern District of Wisconsin, as appears more fully in the Statement of the Case.

STATEMENT OF THE CASE

The Petitioner was indicted in the Eastern District of Wisconsin for willful refusal to report for induction ordered pursuant to the Military Selective Service Act. See Appendix A.

He filed a motion to dismiss the indictment, contending that the Military Selective Service Act is unconstitutional, because direct federal conscription is not a proper means to raise and support Armies, and circumvents the processes for and limitations on organizing, arming, disciplining, and calling forth the Militia. See Appendix B. The motion was denied. See Appendix C.

Trial by jury was waived, and the case was heard by the district court. At trial it was stipulated that, pursuant to the Military Selective Service Act, the Petitioner was ordered "to be conscripted directly into an Army established by Congress, and commanded by officers appointed by the President," and that he "willfully and knowingly failed to report for induction." The Petitioner then moved for dismissal or acquittal, contending that direct federal conscription is not a proper means to raise and support Armies, and circumvents the processes for and limitations on organizing, arming, disciplining, and calling forth the

Militia. The motion was denied, and a finding of guilty was entered.

From final judgment and sentence, the Petitioner appealed to the United States Court of Appeals for the Seventh Circuit, where conviction was affirmed on May 30, 1973. See Appendix D. Petition for rehearing was denied on August 1, 1973. Appendix E. Thereupon this petition for writ of certiorari was brought.

OPINIONS AND ORDERS BELOW

The orders and memoranda of the district and circuit courts have not been published, and are reprinted in Appendices C, D, and E.

REASONS FOR GRANTING THE WRIT

The Military Selective Service Act conscripts private citizens directly into the Army of the United States, which is trained solely by the Federal Government, and commanded by Officers commissioned by the President, not the Governor or Legislature of any State. The Act imposes no restriction whatever on the use of draftees.

More than a half-century ago, this Court held that Congress can draft private citizens directy as a necessary and proper means to raise and support Armies in *Selective Draft Law Cases,* 245 U.S. 366 (1918). The official report of the case summarizes the argument for the United States, which was followed closely and adopted in the opinion of Chief Justice White. The holding rests on an analysis of the intended meaning of the Constitution on the subject of compulsory military service. In turn, every subsequent statute drafting Armies, and every case authority sustaining the constitutionality of such conscription rests on the 1918

precedent. Not once since then has this Court ever reexamined what the Framers of the Constitution actually intended relative to the military draft.

During the past several years, however, it has come to light, and been definitively demonstrated that the Framers of the Constitution intended the power of Congress to raise Armies as nothing more than authority to enlist soldiers for hire, in war or peace, when and if the need should arise—as having nothing at all to do with conscription. Yet still the Framers of the Constitution were extremely sophisticated concerning compulsory military service, and provided for a most ingenious system in the clauses which allow for organizing, arming, disciplining, and calling forth the Militia. Under this system, Congress can require citizens to submit to military discipline in time of peace, and draft citizens for service on the field in times of legal crisis, insurrection, or invasion. But, since Congress cannot draft Armies, the Military Selective Service Act is unconstitutional. Leon Friedman, *Conscription and the Constitution: the Original Understanding*, 67 Mich. L. Rev. 1493 (1969); John Remington Graham, *A Constitutional History of the Military Draft*, Ross & Haines, Inc., Minneapolis, 1971; Harrop A. Freeman, *The Constitutionality of Direct Federal Military Conscription*, 46 Ind. L. Jour. 333 (1971).

In the case of *United States v. Crocker*, 420 F. 2d 307 (8 Cir. 1970), this constitutional objection was carefully examined and described as "serious and thoughtful." Certiorari was denied over the dissenting vote of Justice Douglas, 397 U.S. 1011 (1970).

In this case below, the Petitioner's briefs examined the whole historical record relative to compulsory military service in unparalleled detail from the days of Alfred the Great,

through the struggles between the King and Parliament during the Medieval Period, the Puritan Revolution, the Restoration, the Glorious Revolution, and the 18th Century; then moving to the American situation, the military draft was explored through the Colonial Period and the War of Independence, in relation to the Articles of Confederation, as debated in the Philadelphia Convention of 1787, as discussed in the Federalist, as considered in the Virginia Convention of 1788, as it figured in the formative history of the Second Amendment, and as it was proposed by President George Washington and made law by Congress in the Early National Period; then compulsory military service was also considered in connection with the War of 1812 and the Civil War. Not a stone was left unturned—not the minutest, possible objection was left unanswered. Each statement of the historical analysis in *Selective Draft Law Cases, supra,* was examined and refuted—literally every historical claim made by the Government and the Court in that case is either false or misleading.

Oral argument in the circuit court was protracted. The whole case turned, not on what the Framers of the Constitution intended—that was virtually conceded in favor of the Petitioner—but on whether this Court can change the intended meaning of the Constitution by contrary interpretation. On this latter question there was lively colloquy.

An overriding sense of duty to preserve the intended meaning of the Constitution compels the Petitioner and his Counsel to bring this petition for writ of certiorari.

The Founders of this Republic emphatically denied the power of judges to change the intended meaning of the Constitution by interpretation. See, e. g., the Ordinance of the Virginia Convention of 1788, 1 *Debates* at 327; and James Madison's Report on the Virginia Resolutions of

1798, 4 *Debates* at 549-550. Moreover, this Court, from the days of Chief Justice John Jay to the present era, has always held that the Constitution must be interpreted according to what was intended, and cannot be changed except by amendment. See, e. g., Paterson, J., in *Vanhorne's Lessee v. Dorrance,* 2 Dall. 304 at 308 (1795); Harlan, J., and also Stewart, J., joined by Blackmun, J., and Burger, C.J., in *Oregon v. Mitchell,* 400 U.S. 112 at 154 and 288 (1970). This Court should therefore be sensitive to correcting interpretive holdings at variance with the intended meaning of the Constitution.

It cannot be maintained that because the Military Selective Service Act is in a state of dormancy at present, the question of its constitutionality may be disregarded.

The practice of drafting Armies to fight distant, foreign wars originated in Prussia. In an earlier era, great multitudes came to our shores to escape this form of conscription, which our Founding Fathers sought to avoid by providing for a hardy Citizen Militia. The Military Selective Service Act reinstitutes the un-American practice of drafting Armies. Thousands have been convicted under the Act, and thousands more have expatriated to avoid prosecution. The question of amnesty should not be a political football, but a matter of constitutional jurisprudence.

At his point in our history, our Country is headed toward the establishment of an enormous, all-professional Army. History shows that such institutions invariably destroy civil liberty and promote military despostism. We are directed on this dangerous course, because our men in government have not as yet perceived the significance of the constitutional provisions concerning the Militia, which authorize a legitimate and necessary form of compulsory military service, yet prohibit drafting Armies to fight far-away conflicts.

Congress should be advised of the constitutional limits of compulsory military service before another belligerent crisis, so as to permit effective preparation of the Militia, thereby lessening the need for and counter-balancing the professional Army, while providing a solid bulwark of national defense.

Therefore, a writ of certiorari should issue forthwith.

Respectfully submitted,

HARRY H. PETERSON
JOHN REMINGTON GRAHAM
RICHARD T. OAKES
The Midwestern School of Law
111 East Franklin Avenue
Minneapolis, Minnesota 55404
HARROP A. FREEMAN
The Cornell Law School
Myron Taylor Hall
Ithaca, New York 14850
Curry First
PERRY & FIRST
222 East Mason Street
Milwaukee, Wisconsin 53202
Attorneys for the Petitioner

APPENDICES

UNITED STATES DISTRICT COURT
Eastern District of Wisconsin

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WAYNE HUBERT BRASS,

Defendant.

No. 72 CR 44

APPENDIX A

INDICTMENT

THE GRAND JURY CHARGES:

That on or about the 15th day of March, 1971, at the City of Sheboygan, Sheboygan County, in the State of Wisconsin, within the confines and jurisdiction of the United States District Court for the Eastern District of Wisconsin, the above-named defendant,

WAYNE HUBERT BRASS,

did knowingly, wilfully and unlawfully fail to perform a duty resting upon him under the Military Selective Service Act of 1967 and the Regulations in that, having been classified as Class I-A, he did wilfully and knowingly fail to report for induction to the Sheboygan County Local Board #68, Security National Bank, Sheboygan, Wisconsin, as

required by SSS Form No. 252, Order To Report For Induction, mailed the 26th day of February, 1972, all in violation of Section 462, Title 50 Appendix, United States Code of Laws.

A TRUE BILL:

Dated: March 16, 1972.

/s/ H. RAYMOND ORGAN
Foreman

/s/ DAVID J. CANNON
United States Attorney

APPENDIX B

MOTION TO DISMISS INDICTMENT

Comes now the Defendant, and moves this Court to dismiss the Indictment on file herein. So moved, because the Military Selective Service Act contravenes Article I, Section 8, Clauses 12, 15, 16, and 18, Amendment II, and Amendment X of the United States Constitution. That is, said Act mandates direct federal conscription of Citizens into military service. This form of conscription is not a proper means to raise Armies; circumvents the processes for and limitations upon organizing, arming, disciplining, and calling forth the Militia; impairs the existence of the People as Militia; and infringes upon powers reserved to the several States.

/s/ JOHN REMINGTON GRAHAM
Attorney for the Defendant
212 West Franklin Avenue
Minneapolis, Minnesota 55404
Telephone: 1-612-332-8885

APPENDIX C

DECISION AND ORDER DENYING MOTION TO DISMISS INDICTMENT

GORDON, J. The defendant has moved to dismiss the indictment. He contends that the Selective Service Act violates Article I, section 8, clauses 12, 15, 16 and 18 and also the second and tenth amendments to the Constitution.

This court has previously considered formal motions to dismiss indictments under the Selective Service Act on the grounds of unconstitutionality and has denied such applications. The first such decision was in United States v. Plium, 323 F. Supp. 164 (E.D. Wis. 1971); the second was in United States v. Nilson (No. 70-CR-124, E. D. Wis., decided February 23, 1971). In the latter case, I relied upon the following cases: United States v. Hogans, 369 F.2d 359 (2d Cir. 1966); Richter v. United States, 181 F.2d 591 (9th Cir. 1950), cert. denied 340 U.S. 892 (1950); United States v. Henderson, 180 F.2d 711 (7th Cir. 1950), cert. denied 339 U.S. 963 (1950), rehearing denied 340 U.S. 846 (1950); and Warren v. United States, 177 F.2d 596 (10th Cir. 1949), cert. denied 338 U.S. 947 (1950).

In addition to the foregoing authorities, the broad constitutional right of Congress to raise and support armies was recognized in United States v. O'Brien, 391 U.S. 367, 377 (1968).

In my opinion, there is no merit to Mr. Brass' contention that federal conscription of citizens into military service is an unconstitutional means of organizing and supporting an army. The Selective Service Act does not, in my

judgment, unconstitutionally infringe upon prerogatives reserved either to the states or to the people.

THEREFORE IT IS ORDERED that the defendant's motion to dismiss be and hereby is denied.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 73-1118

UNITED STATES OF AMERICA,
Appellee,

vs.

WAYNE HUBERT BRASS,
Appellant.

APPENDIX D

ORDER AFFIRMING JUDGMENT OF THE DISTRICT COURT

PER CURIAM. The judgment is affirmed. U. S. Const., Art. 1, §8, cl. 1 [. . . provide for the common defense . . .]; Art. 1, §8, cl. 12 [To raise and support armies . . .]; Art. 1, §8, cl. 13 [To provide and maintain a Navy]; Art. 1, §8, cl. 18 [To make all laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof]. The identical ques-

tions raised here were presented by the same counsel in United States of America v. Crocker, 420 F.2d 307 (8th Cir. 1970) cert. denied 397 U.S. 1011 (1970) (Mr. Justice Douglas voted to grant). See also Selective Draft Law Cases, 245 U.S. 366 (1918); ex Parte Quirin, 317 U.S. 1, 25-26 (1942); Lichter v. United States, 334 U.S. 742, 755-758 (1948); United States v. O'Brien, 391 U.S. 367, 377 (1968). But see dissent of Mr. Justice Douglas in United States v. O'Brien, 391 U.S. at 389 and memorandum of Mr. Justice Stewart and dissent of Mr. Justice Douglas in Holmes v. United States, 391 U.S. 936 (1968).

APPENDIX E

ORDER DENYING PETITION FOR REHEARING, ETC.

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be and the same is hereby denied.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The single issue is whether the Military Selective Service Act of 1967, 50 U.S.C. App. 451-462, is a constitutional means for the raising of manpower for military service.

After a non-jury trial in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted of refusing to comply with an order of his local board to report for and to submit to induction into the armed forces in violation of 50 U.S.C. App. 462(a). He was sentenced to two years' probation with a provision for special employment under the Federal Youth Corrections Act. The court of appeals affirmed (Pet. App. D).

The stipulated facts show that petitioner willfully and knowingly failed to report for induction as ordered by his local board acting pursuant to the Selective

Service Act. Petitioner argues that the Act is not a constitutional means to raise and support armies under Article I, Section 8, Clauses 12 and 18 of the Constitution, since it allegedly circumvents the constitutional processes for calling forth the Militia under Article I, Section 8, Clause 13. This contention was rejected in *United States* v. *Crocker*, 420 F. 2d 307 (C.A. 8), certiorari denied, 397 U.S. 1011.

In essence, petitioner urges the overruling of the *Selective Draft Law Cases*, 245 U.S. 366, in which this Court held that Congress can draft private citizens directly as a necessary and proper means to raise and support armies. He does not show, however, that those cases were incorrectly decided or present any convincing reasons why the Court should now re-examine them. See also *United States* v. *O'Brien*, 391 U.S. 367, 377, and cases there cited.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

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PETITIONER'S REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

HARRY H. PETERSON
JOHN REMINGTON GRAHAM
RICHARD T. OAKES
The Midwestern School of Law
111 East Franklin Avenue
Minneapolis, Minnesota 55404
HARROP A. FREEMAN
The Cornell Law School
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PETITIONER'S REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner has shown by reference to specific works, each representing years of scholarship, that *Selective Draft Law Cases*, 245 U.S. 366 (1918), were decided on a misunderstanding of what was intended by the Framers of the Constitution concerning compulsory military service. Cf. *Erie R. R. Co. v. Tompkins*, 304 U.S. 64 (1938), reversing *Swift v. Tyson*, 16 Pet. 1 (U.S. 1842).

The Solicitor General misconceives the issue, refers to the wrong constitutional provisions, and then claims there

has been no showing that *Selective Draft Law Cases* were incorrectly decided. That is no response at all. We refer the Court to the petition.

Respectfully submitted,

HARRY H. PETERSON
JOHN REMINGTON GRAHAM
RICHARD T. OAKES
The Midwestern School of Law
111 East Franklin Avenue
Minneapolis, Minnesota 55404
HARROP A. FREEMAN
The Cornell Law School
Myron Taylor Hall
Ithaca, New York 14850
Curry First
PERRY & FIRST
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Milwaukee, Wisconsin 53202
Attorneys for the Petitioner